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DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[CIS NO. 2330–04] RIN 1615–ZA07
Information Regarding the H–1B Numerical Limitation for Fiscal Year 2005

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Notice.

SUMMARY: This notice explains how the Department of Homeland Security (DHS), through U.S. Citizenship and Immigration Services (USCIS), will process H–1B petitions for new employment for Fiscal Year (FY) 2005 now that it is clear that the demand for H–1B workers will exceed the statutory numerical limit (the cap) for H–1B nonimmigrant aliens for FY 2005. This notice is published so that the public will understand the procedure for processing H–1B petitions now that the cap is reached, as this procedure may affect the hiring decisions of some prospective H–1B petitioners. These procedures are intended to minimize confusion and the burden on employers who use the H–1B program.

DATES: This notice is effective November 23, 2004.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:
Who Is an H–1B Nonimmigrant?

An H–1B nonimmigrant is an alien employed in a specialty occupation or as a fashion model of distinguished merit and ability. A specialty occupation is an occupation that requires theoretical and practical application of a body of specialized knowledge and attainment of a bachelor's or higher degree in the specific specialty as a minimum for admission into the United States.

What Is the Cap or Numerical Limitation on the H–1B Nonimmigrant Classification?

Section 214(g) of the Immigration and Nationality Act (Act) provides that the total number of aliens who may be issued H–1B visas or otherwise granted H–1B status during FY 2005 may not exceed 65,000. In accordance with the Free Trade Agreements (FTA) for Chile and Singapore, as approved by Congress in Public Laws 108–77 and 108–78, 1,400 out of the 65,000 H–1B numbers are reserved for H–1B1 non-immigrants from Chile, and 5,400 out of the 65,000 are reserved for H–1B1 non-immigrants from Singapore. This effectively reduces the overall number of H–1B numbers that may be used prior to September 30, 2005, from 65,000 to 58,200. Section 214(g)(8)(B)(iv) of the Act also requires that any unused H–1B1 numbers set

aside for aliens from Chile and Singapore be applied to the numerical limitation for the fiscal year in which they were not used. Visas may be issued under such an adjustment within 45 days of the next fiscal year to aliens who had applied for such visas during the fiscal year for which the adjustment was made. Id. The total number of Chileans and Singaporeans who were granted H–1B1 visas or otherwise granted H–1B1 status during FY 2004 was less than 100. Therefore, pursuant to Section 214(g)(8)(B)(iv), USCIS has returned approximately 6,700 unused H–1B1 numbers to the FY 2004 H–1B cap. Following the adjustment for the Chile and Singapore H–1B1 program, and taking into account any other cases that can be counted against the FY 2004 cap, there now appears to be a sufficient number of H–1B petitions with employment start dates prior to October 1, 2005 pending at the USCIS Service Centers to reach the adjusted cap for FY2005. Therefore, as of October 2, 2004, and until April 1, 2005, USCIS will return any petitions (along with the filing fee and, if applicable, the premium processing fee) requesting an employment start date prior to October 1, 2005.

What Is the Effect of This Notice?

This notice explains the USCIS procedure for processing H–1B petitions for new employment, which are subject to the H–1B cap, and filed by employers seeking to employ H–1B aliens on or before September 30, 2005.

Will Electronic Filing (e-Filing) for H–1B Nonimmigrant Classification Still Be Available Now That the H–1B Cap for FY 2005 Has Been Reached?

No. Since the H–1B cap has been reached and USCIS is no longer accepting H–1B petitions pursuant to FY 2005 employment, e-filing for H–1B nonimmigrant classification has also been suspended. H–1B extensions and non-cap H–1B cases must now be filed under the mail-in process. In accordance with 8 CFR part 214.2(h)(9)(i)(B), which allows petitions for H–1B classification to be filed 6 months prior to the requested employment start date, petitions filed for work to commence on October 1, 2005 (FY 2006) may be filed via e-filing as early as April 1, 2005.

Why Was the Cap or Numerical Limitation on the H–1B Nonimmigrant Classification Reached So Early in FY 2005?

The FY 2004 cap or numerical limitation on the H–1B nonimmigrant classification was reached on February 17, 2004. As explained in the February 25, 2004 notice published in the **Federal Register** at 69 FR 8675, and under the procedure also carried out in this notice, USCIS regulations at 8 CFR part 214.2(h)(9)(i)(B) allow petitions for H–1B classification to be filed 6 months prior to the requested employment start date. Therefore, beginning on April 1, 2004, petitions filed for work to commence on October 1, 2004 could be filed. Although these petitions were filed in calendar year 2004 they count against the FY 2005 H–1B cap, unless applied to the required adjustment under Section 214(g)(8)(B)(iv). The H–1B cap or numerical limitation of 65,000 under section 214(g) of the Act is set by Congress, and USCIS is required to adhere to the statutory numerical limitation.

Does This Notice Announcing That the Cap Has Been Reached for FY 2005 Affect All H–1B Petitions Filed for FY 2005?

No. This notice relates only to H–1B petitions filed for beneficiaries who are subject to the numerical limitations and will be engaged in ''new employment, ''to commence on or before September 30, 2005. A petition for new employment includes a petition where the alien

beneficiary is outside the United States when the H–1B petition is approved or where the alien is already in the United States in another status and is seeking H–1B status, either through a change of nonimmigrant status from within the United States or a notice to the Consulate of the eligibility for the new status. Petitions for beneficiaries exempt from the H–1B numerical limitations, amended petitions, and petitions for extension of stay are not affected by this procedure because these petitions do not count against the cap. Likewise, petitions for aliens in the United States who already hold H–1B status, *i.e.*, petitions filed on behalf of an H–1B alien by a new or additional employer, generally are not affected by this procedure. This procedure does not relate to petitions filed before October 1, 2005, for employment to commence on or after October 1, 2005.

What Is the USCIS Procedure for Processing H–1B Petitions for New Employment During the Remainder of FY 2005?

This notice informs the public that there appears to be a sufficient number of H–1B petitions pending at USCIS Service Centers to reach the adjusted cap of 58,200 for FY 2005. As of October 2, 2004, USCIS will not accept for adjudication any H–1B petition for new employment containing a request for a work start date prior to October 1, 2005. Petitions filed on or after October 2, 2004 will be returned (along with the filing fee and, if applicable, the premium processing fee) to the petitioner according to 8 CFR 214.2(h)(8)(ii)(E). In accordance with existing regulations, such petitioners may refile those petitions after April 1, 2005, with a new starting date of October 1, 2005, or later. USCIS has established how many H–1B petitions are pending and will likely count towards the FY 2005 statutory limit. USCIS will adjudicate all petitions filed prior to October 2, 2004 in the order in which they are received. USCIS is not suspending premium processing and normal rules applicable to those cases filed on or before October 1, 2004 still apply.

How Should a Petitioner Notify USCIS That It Wishes To Withdraw a Petition?

If a petitioner wishes to withdraw a pending H–1B petition or an approved H–1B petition for new employment, the petitioner should send a withdrawal request to the USCIS service center where the petition is pending or was filed and approved. The request should be signed by the petitioner or an authorized representative and include the filing receipt number and the names of both the petitioner and beneficiary.

Does This Process Apply to H–1B Petitions Filed for Employment To Commence On or After October 1, 2005?

No. Those petitions are not affected by the procedures described in this notice and will be adjudicated in the normal fashion, regardless of whether they are filed after this year's cap is reached. Petitioners are reminded that, pursuant to 8 CFR part 214.2(h)(9)(i)(B), petitions for H–1B classification may not be filed or approved more than 6 months prior to the requested employment start date. Therefore, petitioners filing for work to commence on October 1, 2005 should not file prior to April 1, 2005. H–1B petitions filed for employment to commence on or after October 1, 2005 will be counted, if otherwise chargeable against the annual H–1B cap, against the FY 2006 numerical cap.

How Will USCIS Treat H–1B Petitions That Are Revoked for Any Reason Other Than Fraud or Willful Misrepresentation?

For purposes of the annual numerical limitation, if an H–1B petition was approved in a prior fiscal year (*e.g.* FY 2001, 2002, 2003, 2004) but revoked in FY 2005, that revocation will have no effect on the FY 2005 cap and the number will not be restored to the total number of H–1B new petition approvals available for the remainder of FY 2005. However, if an H–1B petition was approved in FY 2005 (and the approval was counted against the FY 2005 cap), and the H–1B petition subsequently is revoked during FY 2005 for any reason other than fraud or willful misrepresentation (*e.g.* the petitioner goes out of business), that number will be restored to the total number of H–1B petition approvals available for the remainder of FY 2005. If the same H–1B petition is revoked for any reason other than fraud or willful misrepresentation after the end of FY 2005, USCIS will not restore the number to the FY 2005 cap.

How Will USCIS Process H–1B Petitions That Are Revoked for Fraud or Willful Misrepresentation?

Section 108 of the American Competitiveness in the Twenty-first Century Act of 2000, Public Law 106–313 (''AC21''), sets forth the procedure when an H–1B petition is revoked on the basis of fraud or willful misrepresentation. Under AC21, one number for each petition that is revoked on the basis of fraud or misrepresentation shall be restored to the total number of H–1B petition approvals available for the fiscal year during which an H–1B petition is revoked, regardless of the fiscal year in which the petition was approved.

How Will USCIS Process H–1B Petitions That Were Originally Denied But Subsequently Ordered Approved by the Administrative Appeals Office or by a Federal Court?

USCIS has considered cases currently on appeal in its determination of cases that could count towards the statutory cap. USCIS will process approved petitions in the order that they were originally filed with USCIS or the former Immigration and Naturalization Service.

Will USCIS Refund a Filing Fee if a Petition Is Withdrawn or Revoked?

No, USCIS will not refund the $185 filing fee when a petition is revoked or withdrawn. The provisions contained in 8 CFR 103.2(a)(1) preclude the refunding of filing fees on Form I–129 petitions in these situations. USCIS will refund a filing fee only if the refund request is based on USCIS error or if the petition is filed subsequent to October 1, 2004. It should be noted that H–1B cap cases filed under the premium processing program are subject to the conditions contained in this notice.

Dated: October 4, 2004.
Michael Petrucelli,
Deputy Director, U.S. Citizenship and Immigration Services.
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